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THE WORLD ANTI-DOPING CODE, THE ATHLETE'S DUTY OF "UTMOST CAUTION," AND THE ELIMINATION OF CHEATING

PAUL A. CZARNOTA*

I. INTRODUCTION

"When the public reads . . . that a nice kid gets banned for two years for a mistake in taking a cold medication, it undermines the credibility of the system."¹

The World Anti-Doping Code (WADC)² embraces a strict liability standard for doping offences in sport (regardless of an athlete's intent, fault, or negligence), disqualifying any associated sporting results and imposing a two-year suspension to protect "clean" athletes and "ensure the integrity of results."³

In determining whether and to what extent a suspension period should be reduced, the WADC focuses on whether an athlete acted with the "utmost caution" in ensuring no prohibited substances entered his or her body. This involves "measuring the degree of culpability of the athlete in contributing to the analytical positive result."⁴ However, in most inadvertent and innocent doping cases, suspensions will result.

The WADC should focus on whether the athlete intended to cheat using prohibited substances to enhance performance and on any likely future

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1. *Code Collaboration*, PLAY TRUE, no. 1, 2012, at 4, 5, available at http://www.wada-ama.org/Documents/Resources/Publications/PlayTrue_Magazine/PlayTrue_2012_The_Code_in_Review_1_EN.pdf (quoting Richard Young, lead drafter of the World Anti-Doping Code).

2. *See generally* WORLD ANTI-DOPING CODE (2009) [hereinafter WADA CODE].

3. Baxter / Int'l Olympic Comm. (IOC), CAS 2002/A/376, ¶ 32.

4. Richard H. McLaren, *Exceptional Circumstances: Is It Strict?*, 5 INT'L SPORTS L. REV. 32, 35 (2005) (U.K.).

performance-enhancing effect. This approach, consistent with each athlete's "fundamental right to participate in doping-free sport,"⁵ and objective to eliminate cheating⁶ distinguishes between intentional doping and, conversely, innocent or inadvertent doping.

II. BACKGROUND

Doping describes the use of substances or methods that enhance sporting performance, pose health risks to athletes, or violate the "spirit of sport."⁷ Doping can occur in many ways. Substances such as anabolic steroids,⁸ human growth hormone (hGH),⁹ or erythropoietin (EPO)¹⁰ could be used intentionally for performance-enhancing purposes (intentional doping). Medication taken or administered for medical reasons¹¹ or supplements complimenting an athlete's training¹² may contain prohibited substances. Prohibited substances may be ingested through kissing,¹³ drinking from someone's water bottle,¹⁴ food or drink spiking,¹⁵ or even assaults.¹⁶

5. WADA CODE: PURPOSE, SCOPE AND ORGANIZATION OF THE WORLD ANTI-DOPING PROGRAM AND THE CODE 11 (2009) [hereinafter WADA CODE: PURPOSE, SCOPE AND ORGANIZATION].

6. UNESCO International Convention against Doping in Sport, *opened for signature* Oct. 19, 2005, 2419 U.N.T.S. 201 (entered into force Feb. 1, 2007) [hereinafter UNESCO International Convention].

7. WADA CODE art. 4.3.3.

8. *See, e.g.*, Johnson v. Athletics Can., 1997 CarswellOnt 3340 (Can. Ont. Ct. J. Gen. Div.) (WL). Anabolic steroids are "drug(s) . . . or hormonal substance(s), chemically related to [the male growth hormone] testosterone." *Anabolic Steroids*, CTR. FOR SUBSTANCE ABUSE RESEARCH, <http://www.cesar.umd.edu/cesar/drugs/steroids.asp> (last updated May 2, 2005).

9. *See, e.g.*, Edward H. Jurith & Mark W. Beddoes, *The United States' and International Response to the Problem of Doping in Sports*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 461, 467 (2002).

10. *Id.* at 467–68.

11. *See generally, e.g.*, WADA / Fédération Internationale de Gymnastique (FIG) & Melnychenko, CAS 2011/A/2403; S. / Fédération Internationale de Natation Amateur (FINA), CAS 2005/A/830; Baxter / IOC, CAS 2002/A/376; Raducan / IOC, CAS ad hoc Division 2000/011 (O.G. Sydney).

12. *See generally, e.g.*, WADA / Hardy & U.S. Anti-Doping Agency (USADA), CAS 2009/A/1870; *see also* Michael S. Straubel, *Lessons from USADA v. Jenkins: You Can't Win When You Beat a Monopoly*, 10 PEPP. DISP. RESOL. L.J. 119, 119–21 (2009) (discussing the case of LaTasha Jenkins, a former U.S. sprinter, who took over-the-counter supplements on advice from her coach and was unaware that they contained prohibited substances).

13. *See generally, e.g.*, Int'l Tennis Fed'n (ITF) / Gasquet, CAS 2009/A/1926 & WADA / ITF & Gasquet, CAS 2009/A/1930.

14. *See generally* Puerta / ITF, CAS 2006/A/1025.

15. WADA CODE arts. 10.5.1 & 10.5.2 cmt. (2009).

16. *See generally* Adams / Canadian Ctr. for Ethics in Sport (CCES), CAS 2007/A/1312; *see*

Intention aside, it can occur inadvertently or innocently.¹⁷ Inadvertent doping describes when athletes ingest food, drink, medication, vitamins, or supplements without diligently examining whether it contains prohibited substances.¹⁸ Innocent doping describes when athletes take prohibited substances without any fault or negligence.¹⁹

Although having characteristics akin to a criminal law regime,²⁰ anti-doping law derives from various contractual arrangements between the governing bodies comprising the Olympic Movement (Movement). The Olympic Charter (Charter) is the key constitutional document²¹ that codifies the principles of “Olympism”²² and establishes the International Olympic

also Paul White, *Malicious Drugging and the Contaminated Catheter: Adams v Canadian Centre for Ethics in Sport*, SPORTS L. EJ. 1, 3–4 (2008) (Austl.), available at <http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1007&context=slej>.

17. Hayden Opie, *Legal Regimes for the Control of Performance-Enhancing Drugs in Sport*, 12 ADEL. L. REV. 332, 343–44 (1989–90) (Austl.).

18. *Id.* The duty imposed on athletes is regularly referred to as the “Duty of Utmost Caution.” See, e.g., Fédération Internationale de Football Association (FIFA) & WADA, Advisory Opinion, CAS 2005/C/976 & 986, ¶ 73 (stating that “[t]he WADC imposes on the athlete a duty of utmost caution to avoid that a prohibited substance enters his or her body.”) (emphasis omitted).

19. Opie, *supra* note 17, at 343–44. For example, when athletes take prohibited substances through sabotage, contamination, or assault.

20. Doping violations are commonly referred to as “offences”; athletes caught doping are often said to have been found “guilty” of a doping offence; and, the underlying purposes behind the imposition of sanctions for doping involve the same considerations as in criminal sanctioning, being punishment and deterrence. Further, depending on the seriousness of the charged doping offence, the standard of proof required to satisfy CAS that a doping offence is proved is said to be “a very high standard almost approaching beyond reasonable doubt.” See French / Australian Sports Comm’n & Cycling Austl., CAS 2004/A/651, ¶ 42; see also Michael Straubel, *Enhancing the Performance of the Doping Court: How the Court of Arbitration for Sport Can Do Its Job Better*, 36 LOY. U. CHI. L.J. 1203, 1259–60 (2005). Finally, the criminal law principle *nulla poena sine culpa* has been held by sporting tribunals to apply to doping disputes. Gabrielle Kaufmann-Kohler et al., *Legal Opinion on the Conformity of Certain Provisions of the Draft World Anti-Doping Code with Commonly Accepted Principles of International Law*, Feb. 26, 2003, ¶¶ 124–25, available at http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-Legal_Library/Advisory_and_Legal_Opinions/kaufmann-kohler-full.pdf.

21. OLYMPIC CHARTER: INTRODUCTION TO THE OLYMPIC CHARTER 8 (2011). The Olympic Charter, as a basic instrument of a constitutional nature, sets out the “Fundamental Principles” and essential values of Olympism, serves as a statute for the IOC, and defines the rights and obligations of the IOC, the International Federations (IFs) and the National Olympic Committees (NOCs).

22. *Id.* “Olympism” is defined as:

[A] philosophy of life, exalting and combining in a balanced whole the qualities of body, will and mind. Blending sport with culture and education, Olympism seeks to create a way of life based on the joy of effort, the educational value of good example, social responsibility and respect for universal fundamental ethical principles.

The goal of Olympism is to place sport at the service of the harmonious development of humankind, with a view to promoting a peaceful society concerned with the preservation of human dignity.

Committee (IOC) as the supreme authority²³ and leader of the fight against doping.²⁴

The IOC is empowered to recognise the International Federations (IFs) governing each sport internationally,²⁵ the National Olympic Committees (NOCs) responsible for protecting the Movement nationally,²⁶ and the National Governing Bodies (NGBs) governing individual sports nationally.²⁷ All IFs, NOCs, and NGBs are bound to the Charter; failure to comply may result in exclusion from the Movement.²⁸ Athletes, coaches, and officials are also bound to the Charter.²⁹

All Olympic participants must comply with the WADC.³⁰ To be included and remain on the Olympic programme, sports must adopt the WADC.³¹ In addition to Olympic sports, however, the WADC is increasingly governing non-Olympic sports.³² Upon application to host the Olympics, states undertake measures to comply with and respect the Charter (and by extension the WADC).³³ Moreover, most countries have ratified the International Convention against Doping in Sport,³⁴ requiring compliance with the WADC.

OLYMPIC CHARTER: FUNDAMENTAL PRINCIPLES OF OLYMPISM 10.

23. OLYMPIC CHARTER R. 1.1.

24. *Id.* R. 2.8.

25. *See id.* R. 3.3, 25. Examples of IFs include FIFA (international governing body for soccer, or football as it is more commonly known around the world), FINA (international governing body for swimming), and the International Association of Athletics Federation (world governing body for track and field).

26. *See id.* R. 3.1–3.2, 27.1–27.2. Examples of NOCs include the Australian Olympic Committee, the U.S. Olympic Committee, and the British Olympic Association.

27. *See id.* R. 29. National Governing Bodies (NGBs) are also commonly referred to as National Federations. Examples of NGBs include U.S. Track & Field and Swimming Australia.

28. *Id.* R. 3.2.

29. *Id.* R. 40.

30. *Id.* R. 2.8 (the role of the IOC includes “lead[ing] the fight against doping in sport”), R. 25 (all IFs must adopt and implement the WADC), R. 27.2.6 (all NOCs must adopt and implement the WADC), R. 29 (all NGBs must “be governed by and comply in all aspects with the Olympic Charter and the rules of its IF”), R. 40 (“To be eligible for participation in the Olympic Games, a competitor, coach, trainer or other team official must comply with the Olympic Charter” and “respect and comply in all aspects” with the WADC), R. 43 (“The WADC is mandatory for the whole Olympic Movement.”).

31. *Id.* R. 45.3. By 2004, all summer Olympic sports had adopted the WADC. Ryan Connolly, Note, *Balancing the Justices in Anti-Doping Law: The Need to Ensure Fair Athletic Competition Through Effective Anti-Doping Programs vs. the Protection of Rights of Accused Athletes*, 5 VA. SPORTS & ENT. L.J. 161, 165 (2006).

32. Jessica K. Foschi, Note, *A Constant Battle: The Evolving Challenges in the International Fight against Doping in Sport*, 16 DUKE J. COMP. & INT’L L. 457, 463 (2006).

33. OLYMPIC CHARTER R. 33.3.

34. UNESCO International Convention, *supra* note 6. By August 4, 2008, over ninety countries had ratified the International Convention against Doping in Sport (ICADS). *See United*

After “considerable pressure” from the Australian government, the Australian Football League adopted the WADC.³⁵ The National Rugby League³⁶ and the International Cricket Council have adopted it.³⁷ The National Football League (NFL),³⁸ National Basketball Association,³⁹ National Hockey League,⁴⁰ and Major League Baseball⁴¹ have yet to adopt it; however, this seems inevitable with increasing pressure from the IOC, World Anti-Doping Agency (WADA), and the U.S. government.⁴²

Brief mention should be made of the Court of Arbitration for Sport (CAS), an arbitral tribunal established to adjudicate all Olympic-related disputes including doping cases.⁴³ The developing body of CAS awards is

States Ratifies International Convention against Doping in Sport, U.N. EDUC., SCI. & CULTURAL ORG. (Aug. 6, 2008), http://portal.unesco.org/en/ev.php-URL_ID=43227&URL_DO=DO_TOPIC&URL_SECTION=201.html; see also *International Convention Against Doping in Sport. Paris 19 Oct. 2005*, U.N. EDUC., SCI. & CULTURAL ORG., <http://www.unesco.org/eri/la/convention.asp?KO=31037&language=E&order=alpha> (last visited Nov. 15, 2012) (listing the countries that have ratified and accepted the ICADS).

35. Paul Horvath, *Anti-Doping and Human Rights in Sport: The Case of the AFL and The WADA Code*, 32 MONASH U. L. REV. 357, 357 (2006) (Austl.).

36. *Id.* at 371.

37. See *Overview—Anti Doping*, INT’L CRICKET COUNCIL, http://www.icc-cricket.com/anti_doping/overview.php (last visited Nov. 15, 2012).

38. *NFL Could Enlist WADA Testing*, SPORTS SUPPLEMENT REVIEWER (May 9, 2011), <http://sportssupplementreviewer.com/2011/05/nfl-could-enlist-wada-testing/>.

39. *Questions & Answers on the Code*, WADA, <http://www.wada-ama.org/en/World-Anti-Doping-Program/Sports-and-Anti-Doping-Organizations/The-Code/QA-on-the-Code/> (last updated Sept. 2011).

40. *WADA Statement on the NHL*, WADA (Nov. 8, 2011), <http://www.wada-ama.org/en/Media-Center/Archives/Articles/WADA-statement-on-the-NHL/>.

41. Associated Press, *WADA: MLB Should Strengthen Rules*, ESPN (July 8, 2009), <http://sports.espn.go.com/mlb/news/story?id=4314291>.

42. Matthew Hard, Note, *Caught in the Net: Athletes’ Rights and the World Anti-Doping Agency*, 19 S. CAL. INTERDISC. L.J. 533, 544 (2010). The author notes that the United States signed ICADS on August 4, 2008. See also *United States Ratifies International Convention Against Doping in Sport*, *supra* note 34.

43. OLYMPIC CHARTER R. 61.2; Matthew J. Mitten & Hayden Opie, “Sports Law”: *Implications for the Development of International, Comparative, and National Law and Global Dispute Resolution*, 85 TUL. L. REV. 269, 285 (2010); WADA CODE art. 13. Further, Professor Mitten stated:

Like other arbitral bodies, the CAS’s jurisdiction is dependent upon the parties’ written agreement to submit their dispute to the CAS for final adjudication[] . . . , which bars litigation arising out of the subject dispute in a judicial forum. The IOC and all Olympic IFs have agreed to CAS jurisdiction By rule, the IFs require their respective member NGBs and athletes to submit all disputes with the IF to CAS arbitration.

MATTHEW J. MITTEN ET AL., *SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS* 318 (2d ed. 2009) (internal citations omitted). CAS awards are foreign arbitral awards recognised and enforceable under the New York Convention: The United Nations Convention on the Recognition and

incrementally creating a sporting jurisprudence—“Lex Sportiva”—from which anti-doping law derives. CAS recently stated that “although a CAS panel in principle might end up deciding differently from a previous panel, it must accord to previous CAS awards a substantial precedential value and it is up to the party advocating a jurisprudential change to submit persuasive arguments and evidence to that effect.”⁴⁴

III. THE WORLD ANTI-DOPING CODE

Various high-profile doping incidents,⁴⁵ perceptions of nonchalance by the IOC in fighting doping,⁴⁶ and growing health concerns relating to substance abuse⁴⁷ prompted the creation of WADA⁴⁸ and the WADC.⁴⁹ The WADC established a range of doping offences including the presence⁵⁰ or use⁵¹ of prohibited substances or methods, refusing to submit samples,⁵² failing to file whereabouts information,⁵³ tampering of doping controls,⁵⁴ and possession,⁵⁵ trafficking,⁵⁶ and administration.⁵⁷

The WADC embraces strict liability for all doping offences for various reasons.⁵⁸

Enforcement of Foreign Arbitral Awards (the New York Convention). See Matthew J. Mitten, *Judicial Review of Olympic and International Sports Arbitration Awards: Trends and Observations*, 10 PEPP. DISP. RESOL. L.J. 51, 62 (2009); Connolly, *supra* note 31, at 164.

44. Anderson / IOC, CAS 2008/A/1545, ¶ 118.

45. In the 1988 Olympic Games in Seoul, Ben Johnson defeated long-time rival Carl Lewis, winning gold in the 100m sprint in world record time. He later tested positive to anabolic steroids. During the 1998 Tour-de-France, French police raided the hotel rooms of various athletes and teams and reportedly recovered “remarkable quantities of banned substances.” Anita L. DeFrantz, *Which Rules?: International Sport and Doping in the 21st Century*, 31 HOUS. J. INT’L L. 1, 16 (2008); see also Daniel Gandert & Fabian Ronisky, *American Professional Sports is a Doper’s Paradise: It’s Time We Make a Change*, 86 N.D. L. REV. 813, 818 (2010); Zachary Blumenthal, Note, *The Punishment of All Athletes: The Need for a New World Anti-Doping Code in Sports*, 9 J. INT’L BUS & L. 201, 205 (2010).

46. Connolly, *supra* note 31, at 165.

47. Hard, *supra* note 42, at 537–38.

48. Blumenthal, *supra* note 45, at 205; Connolly, *supra* note 31, at 165.

49. Connolly, *supra* note 31, at 165.

50. WADA CODE art. 2.1 (2009).

51. *Id.* art. 2.2 (attempting to use is also prohibited).

52. *Id.* art. 2.3 (failing to submit a “Sample” is also prohibited).

53. *Id.* art. 2.4 (relating to “Out-of-Competition” testing).

54. *Id.* art. 2.5 (attempting tampering is also prohibited).

55. *Id.* art. 2.6.

56. *Id.* art. 2.7 (attempting trafficking is also prohibited).

57. *Id.* art. 2.8 (attempting to administer is also prohibited).

58. See, e.g., *id.* art. 2.1.1 (stating that “[i]t is each Athlete’s personal duty to ensure that no

The pursuit of fairness in sport is said to outweigh the rights of a doping athlete. In *Chagnaud v. Fédération Internationale de Natation Amateur*, CAS stated:

[T]he system of strict liability of the athlete must prevail when sporting fairness is at stake. . . . [O]nce a banned substance is discovered . . . , [the athlete] must automatically be disqualified from the competition in question, without any possibility for him to rebut this presumption of guilt It would indeed be shocking to include in a ranking an athlete who had not competed using the same means as his opponents, for whatever reasons.⁵⁹

Similar comments were made in *USA Shooting & Quigley v. International Shooting Union*.⁶⁰ Moreover, any requirement to prove guilt may result in intentional dopers escaping sanction⁶¹ and attract “costly litigation that may well cripple federations—particularly those run on modest budgets”⁶²

Anti-doping organisations bear the onus of proving doping offences to the “comfortable satisfaction” standard.⁶³ This standard is “greater than a mere

Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete’s part be demonstrated in order to establish an anti-doping violation”) (emphasis omitted). WADC Comment to Article 2.1.1 provides that:

For purposes of anti-doping rule violations involving the presence of a Prohibited Substance (or its Metabolites or Markers), the Code adopts the rule of strict liability Under the strict liability principle, an Athlete is responsible, and an anti-doping rule violation occurs, whenever a Prohibited Substance is found in an Athlete’s Sample. The violation occurs whether or not the Athlete intentionally or unintentionally Used a Prohibited Substance or was negligent or otherwise at fault.

Id. art. 2.1.1 cmt.

59. MITTEN ET AL., *supra* note 43, at 340 (quoting Chagnaud / FINA, CAS 95/141); *see also* Connolly, *supra* note 31, at 179 (quoting N. / Fédération Equestre Internationale (FEI), CAS 94/126, ¶¶ 141, 245) (where similar considerations were made albeit in the case of a doped horse: “the ‘interests of the rider of a doped horse, even if he/she is totally innocent, must be weighed up against those of all the other competitors who entered the event ‘clean.’ . . . ‘[I]n order to preserve equality between competitors, the disqualification should stand even if the rider is innocent.’”).

60. In *USA Shooting & Quigley v. International Shooting Union*, CAS considered it “a laudable policy objective not to repair an accidental unfairness to an individual by creating an intentional unfairness to the whole body of other competitors. This is what would happen if banned performance-enhancing substances were tolerated when absorbed inadvertently.” CAS 94/129, ¶ 15.

61. CAS, in considering whether to apply a test of strict liability for doping offences, stated that “it is likely that even intentional abuse would in many cases escape sanction for lack of proof of guilty intent.” *Id.*

62. *Id.*

63. WADA CODE art. 3.1.

balance of probability but less than proof beyond reasonable doubt;”⁶⁴ although, in *French v. Australian Sports Commission & Cycling Australia*, CAS accepted that for serious doping offences “comfortable satisfaction” requires “a very high standard almost approaching beyond reasonable doubt.”⁶⁵ Doping violations may be proven “by any reliable means.”⁶⁶

Once proven, any associated sporting results are disqualified automatically.⁶⁷ CAS considers it “perfectly proper”

[F]or the rules of a sporting federation to establish that the results achieved by a “doped athlete” at a competition during which he was under the influence of a prohibited substance must be cancelled irrespective of any guilt on the part of the athlete. . . . The interests of the athlete . . . in not being punished without being guilty must give way to the fundamental principle of sport that all competitors must have equal chances.⁶⁸

Automatic disqualifications protect the integrity of sporting results, and also the credibility of sporting icons by preventing question marks surrounding the legitimacy of sporting achievements.⁶⁹

In addition to disqualifications, where the violation relates to the presence or use of a prohibited substance or method, a two-year ineligibility period is imposed automatically⁷⁰ to prevent, deter, and punish cheating.⁷¹

IV. ELIMINATING OR REDUCING INELIGIBILITY

Athletes may seek an elimination or reduction of the two-year suspension

64. *Id.*

65. *French / Australian Sports Comm’n & Cycling Austl.*, CAS 2004/A/651, ¶ 42.

66. WADA CODE art. 3.2. Any reliable means includes admissions of guilt, credible third party testimony, or reliable analytical data from athlete samples. *See id.* art. 3.2 cmt.

67. *Id.* art. 9.

68. A. / Fédération Internationale de Lutttes Associées (FILA), CAS 2001/A/317, ¶ 24 (citations omitted). *See also* Kaufmann-Kohler et al., *supra* note 20, ¶¶ 101–02 (noting that the appropriateness of the rule requiring automatic disqualifications of any connected competition results is unanimously shared).

69. Jurith & Beddoes, *supra* note 9, at 462.

70. WADA CODE art. 10.2. *See also id.* art. 10.3 (providing alternative ineligibility periods for other doping violations). Further, the two-year ineligibility period can be eliminated or reduced (discussed *infra* Part IV) or increased depending on the athlete’s individual circumstances: WADA CODE arts. 10.4, 10.5, 10.6, app. 1 at 128–29 (defining Ineligibility and Consequences of Anti-Doping Rules Violations).

71. British Olympic Ass’n (BOA) / WADA, CAS 2011/A/2658, ¶ 5.53; Kaufmann-Kohler et al., *supra* note 20, ¶ 102.

under WADC Articles 10.4 and 10.5.

A. Article 10.4

Where an athlete, committing a first offence, establishes (on the balance of probabilities) how the specified substance entered his or her body⁷² and (on the comfortable satisfaction standard) that the specified substance was not intended to enhance his or her sporting performance or mask the use of another performance-enhancing substance,⁷³ the two-year suspension may be reduced to a reprimand.⁷⁴ Article 10.4 applies only to specified substances⁷⁵ because there is a greater likelihood that they could have been ingested for a “credible, non-doping explanation.”⁷⁶

Under Article 10.4, the degree of the athlete’s fault is considered in determining the appropriate reduction,⁷⁷ having regard to the “specific and relevant [circumstances that] explain the [a]thlete’s . . . departure from the expected standard of behavior.”⁷⁸

In *Union Cycliste Internationale (UCI) v. Kolobnev & Russian Cycling Federation*, a Russian cyclist competing in the 2011 Tour de France tested positive for hydrochlorothiazide (HCT).⁷⁹ The Russian Cycling Federation anti-doping commission determined that a doping violation had occurred,

72. WADA CODE art. 10.4 cmt.

73. *Id.* art. 10.4 & cmt. There has been some uncertainty as to whether the athlete must demonstrate an absence of intent to enhance sport performance by the use of the “Specified Substance” or the product (e.g., supplement) that contains the “Specified Substance.” In *Oliveira v. USADA*, CAS held that the athlete need only prove that he or she did not take the “Specified Substance” with intention to enhance sporting performance, and not the product, for the purposes of WADC Article 10.4. CAS 2010/A/2107, ¶¶ 9.14, 9.17. In *Foggo v. National Rugby League*, CAS held that the athlete needs to show that the product was not taken to enhance performance. See generally CAS A2/2011. In *Union Cycliste Internationale (UCI) v. Kolobnev & Russian Cycling Federation*, CAS agreed with the award in *Oliveira*. CAS 2011/A/2645, ¶¶ 78–80.

74. WADA CODE art. 10.4.

75. “Specified Substances” are all prohibited substances except those in classes S1, S2, S4.4, S4.5, S6.a and prohibited methods M1, M2, and M3. THE WORLD ANTI-DOPING CODE, THE 2012 PROHIBITED LIST 2 (2011). Examples include diuretics or masking agents such as Furosemide; stimulants such as cathine, ephedrine and pseudoephedrine; narcotics such as morphine and heroin, and cannabinoids (marijuana). *Id.* at 5, 7–8.

76. WADA CODE art. 10.4 cmt.

77. *Id.* art. 10.4.

78. *Id.* art. 10.4 cmt. This comment provides, as examples, the following circumstances that would not be considered “specific and relevant”: “[T]he fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility or the fact that the Athlete only has a short time left in his or her career or the timing of the sporting calendar” *Id.*

79. UCI / Kolobnev & Russian Cycling Fed’n, CAS 2011/A/2645, ¶¶ 2–9.

however, it imposed a reprimand and no suspension.⁸⁰

The UCI appealed unsuccessfully to CAS,⁸¹ which accepted that Kolobnev had been taking the supplement Natural Kapilyaroprotektor in treatment for a chronic vascular disease,⁸² he purchased it from a reliable drugstore,⁸³ and he had never tested positive for prohibited substances.⁸⁴ CAS was satisfied that Kolobnev did not intend to enhance sporting performance;⁸⁵ the supplement was being used for “medical reasons totally unrelated to sport performance”⁸⁶ with Kolobnev unaware that the supplement contained HCT.⁸⁷

In upholding the reprimand, CAS considered that a sanction should only be reviewed if it was “evidently and grossly disproportionate to the offence,”⁸⁸ stating that CAS must not “tinker with a well-reasoned sanction.”⁸⁹

Notwithstanding *Kolobnev*, other CAS awards highlight the unfair outcomes available under Article 10.4.

In *WADA v. Fédération Internationale de Gymnastique (FIG) & Melnychenko*, a gymnast (age 15) tested positive for Furosemide after winning gold at the 2010 ACRO Championships.⁹⁰ The International Gymnastics Federation disqualified the result but reduced her suspension to two-months.⁹¹ WADA appealed to CAS.

Melnychenko led evidence that prior to the championships she had been suffering with a furnacle in her nose and was experiencing pain and high temperatures.⁹² Her father took her to a hospital and consented to her treating doctor administering Lasix, which contained Furosemide.⁹³ Melnychenko had never previously tested positive for any prohibited substances.⁹⁴ When asked,

80. *Id.* ¶¶ 13–15.

81. *Id.* ¶¶ 17, 82–83, 85–95.

82. *Id.* ¶¶ 15, 87.

83. *Id.* ¶ 87.

84. *Id.*

85. *Id.* ¶ 82.

86. *Id.*

87. *Id.*

88. *Id.* ¶ 94 (quoting WADA / Hardy & USADA, CAS 2009/A/1870, ¶ 125) (emphasis omitted).

89. *Id.* (quoting Kendrick / Int’l Tennis Fed’n (ITF), CAS 2011/A/2518, ¶ 10.7) (emphasis and internal quotation marks omitted).

90. WADA / FIG & Melnychenko, CAS 2011/A/2403, ¶ 2.3.

91. *Id.* ¶ 2.6.

92. *Id.* ¶ 2.5.

93. *Id.* ¶ 6.4.

94. *Id.* ¶ 2.2.

her doctor erroneously advised that Lasix did not contain any prohibited substances.⁹⁵ Both WADA and FIG conceded that Lasix was “justifiably prescribed” in treating her condition.⁹⁶

Overall, CAS deemed it appropriate to reduce the two-year suspension, taking account of Melnychenko’s age and inexperience;⁹⁷ however, it increased her suspension to four months, noting that doping violations are “serious offence[s] for an athlete who bears the ultimate responsibility.”⁹⁸

In *Drug Free Sport New Zealand v. Chalmers*, a boxer tested positive for Furosemide after winning her division at the National Boxing Championships.⁹⁹ The Sports Tribunal of New Zealand accepted that Chalmers took Furosemide on prescription of her doctor (an experienced sports medicine practitioner)¹⁰⁰ for treatment of problems associated with menstruation.¹⁰¹ Her doctor erroneously advised her not to take Furosemide “‘close to’ or ‘around’ competition.”¹⁰² The tribunal reduced her suspension to three months, holding that she was a senior athlete who should have done more.¹⁰³

In *Melnychenko*, CAS increased the original sanction from two months to four months; however, as noted in *Kolobnev*, a sanction should be reviewed only if it was “‘evidently and grossly disproportionate to the offence.’”¹⁰⁴ Moreover, it is difficult to rationalise imposing any suspension on a young athlete who honestly and in good faith took appropriately prescribed medication for a dangerous medical condition, having made due enquiries with her treating doctor that the medication did not contain any prohibited substances. Similarly with *Chalmers*, it was accepted that the substance was taken legitimately for a medical condition.

The *Melnychenko* award and *Chalmers* decision highlight an inherent inconsistency in the objects of the WADC, namely between the object of protecting the health and well-being of athletes (one of the underlying aims of

95. *Id.* ¶ 7.5.

96. *Id.* ¶ 6.4.

97. *Id.* ¶ 7.8; see also generally Foschi / FINA, CAS 96/156; S. / FINA, CAS 2005/A/830.

98. *Melnychenko*, CAS 2011/A/2403, ¶ 7.9.

99. *Drug Free Sport N.Z. v. Chalmers* (unreported) Sports Tribunal 13/09, ¶¶ 5–6, 11 Mar. 2010 (N.Z.).

100. *Id.* ¶ 7.

101. *Id.* ¶¶ 6–7, 19.

102. *Id.* ¶¶ 7–8.

103. *Id.* ¶¶ 21–24.

104. UCI / Kolobnev & Russian Cycling Fed’n, CAS 2011/A/2645, ¶ 94 (quoting WADA / Hardy & USADA, CAS 2009/A/1870, ¶ 125).

the WADC)¹⁰⁵ and punishing and deterring athletes from taking appropriate medications for treatment purposes. For the above reasons, Article 10.4 fails to differentiate sufficiently between intentional cheating, and conversely, inadvertent or innocent doping.

B. Article 10.5

Article 10.5 may enable athletes to eliminate or reduce a two-year suspension period for “No Fault or Negligence” or, alternatively, “No Significant Fault or Negligence.”¹⁰⁶ However, Article 10.5 can only be invoked in “truly exceptional” circumstances and “not in the vast majority of cases”¹⁰⁷ and, similar to Article 10.4, tends to produce unsatisfactory outcomes.

1. No Fault or Negligence

Article 10.5.1 provides that where an athlete establishes that he or she bears “No Fault or Negligence,” the two-year ineligibility period is eliminated.¹⁰⁸ “No Fault or Negligence” means an athlete does not know or suspect, or could not reasonably have known or suspected, that he or she used or administered a prohibited substance.¹⁰⁹

As an illustration, if a doping offence occurred due to rival sabotage, this constitutes “No Fault or Negligence.”¹¹⁰ However, if a doping offence occurred due to a supplement being contaminated or incorrectly labeled, medication being administered by a medical practitioner without disclosure to the athlete, or a spouse, coach, or associate spiking an athlete’s food or drink, “No Fault or Negligence” will not exist.¹¹¹

In *International Tennis Federation v. Gasquet*, the athlete established “No Fault or Negligence” in ingesting a small quantity of cocaine from kissing a

105. The Purpose, Scope and Organization of the World Anti-Doping Program and the *Code* provides that “[t]he purposes of the World Anti-Doping *Code* and the World Anti-Doping Program . . . are[] to . . . promote health” WADA CODE: PURPOSE, SCOPE AND ORGANIZATION 11 (2009). Further, WADC Article 4.3 provides that, for a substance to be included on the Prohibited List, one of the criteria considered is whether there is medical or scientific evidence that use of the substance or method “represents an actual or potential health risk to the Athlete.” WADA CODE art. 4.3.1.2 (emphasis omitted).

106. *Id.* arts. 10.5.1 & 10.5.2 cmt.

107. *Id.*

108. *Id.* art. 10.5.1.

109. *Id.* app. 1 at 131 (defining “No Fault or Negligence”).

110. *Id.* arts. 10.5.1 & 10.5.2 cmt.

111. Although, these occurrences may constitute “No Significant Fault or Negligence.” *See id.*

stranger, as he did not know, and could not reasonably have suspected, that he could be contaminated in this manner.¹¹² CAS considered that the duty of “utmost caution” does not require an athlete to refrain from “go[ing] out to a restaurant where he might meet an attractive stranger whom he might later be tempted to kiss,” because this sets “unrealistic and impractical expectations.”¹¹³

In *Adams v. Canadian Centre for Ethics in Sport*,¹¹⁴ a paraplegic track-and-field athlete tested positive to a cocaine metabolite passed through a catheter.¹¹⁵ An unknown woman placed cocaine on his lips while he pretended to be sleeping at a bar.¹¹⁶ CAS held that Adams bore “No Fault or Negligence” because cocaine entered his body through an assault committed on him.¹¹⁷

It seems that inadvertent or innocent dopers, absent exceptional circumstances, cannot rely upon Article 10.5.1.

2. No Significant Fault or Negligence

Where an athlete establishes “No Significant Fault or Negligence,” the two-year suspension may be reduced to one year.¹¹⁸ The appropriate reduction is determined by “measuring the degree of [the athlete’s] culpability . . . in contributing to the analytical positive result”¹¹⁹ and ensuring the sanction is proportionate to the “seriousness of the infringements.”¹²⁰

In assessing whether an athlete’s fault or negligence was “significant,” the WADC imposes an onerous “*duty of utmost caution* to avoid [any] prohibited substance enter[ing] his or her body.”¹²¹ This duty requires athletes to “leave no reasonable stone unturned,”¹²² although the “taking [of] reasonable steps should be sufficient [as] ‘one can always do more.’”¹²³

112. ITF / Gasquet, CAS 2009/A/1926 & WADA / ITF & Gasquet, CAS 2009/A/1930, ¶ 5.31.

113. *Id.* ¶ 5.32 (quoting FIFA & WADA, Advisory Opinion, CAS 2005/C/976 & 986, ¶ 73) (emphasis omitted).

114. *Adams / CCES*, CAS 2007/A/1312.

115. White, *supra* note 16, at 3.

116. *Adams / CCES*, CAS 2007/A/1312, ¶¶ 34–35.

117. *Id.* ¶¶ 155, 159.

118. WADA CODE art. 10.5.2 (2009).

119. McLaren, *supra* note 4, at 35.

120. S. / FINA, CAS 2005/A/830, ¶ 44 (quoting Ward / Fédération Equestre Internationale (FEI), CAS 1999/A/246, ¶ 31) (emphasis omitted).

121. FIFA & WADA, Advisory Opinion, CAS 2005/C/976 & 986, ¶ 73.

122. Despres / Canadian Ctr. for Ethics in Sport (CCES), CAS 2008/A/1489 & WADA / Despres, CCES, & Bobsleigh Can. Skeleton, CAS 2008/A/1510, ¶ 7.8.

123. *Id.*

The duty of “utmost caution” requires athletes to know what constitutes a doping offence and what substances and methods are included on the Prohibited List,¹²⁴ follow health care and nutrition guidelines set by governing bodies,¹²⁵ review a product’s packaging,¹²⁶ refrain from ingesting any products without consulting a “competent medical professional,”¹²⁷ refrain from ingesting products from “unreliable sources,”¹²⁸ and avoid places with an “increased risk of contamination.”¹²⁹

Receiving erroneous medical advice¹³⁰ or a prescription from a doctor does not excuse doping, because athletes are required to “investigat[e] to their fullest extent that the medication does not contain prohibited substances.”¹³¹ Athletes must enquire with their doctor about the composition of the prescribed medication and ask whether it is WADC compliant.¹³²

Athletes must also make enquiries with manufacturers about the contents of products,¹³³ conduct research into a product’s composition,¹³⁴ seek advice from a nutritionist,¹³⁵ and make use of telephone advice lines established to answer doping-related questions.¹³⁶

In *Knauss v. International Ski Federation*, a skier tested positive for Norandrosterone (contained in a supplement).¹³⁷ He did not take the supplement for performance-enhancing purposes and was unaware that the

124. WADA CODE art. 2; *FIFA*, 2005/C/976 & 986, ¶ 73.

125. *FIFA*, 2005/C/976 & 986, ¶ 73.

126. *S. / FINA*, CAS 2005/A/830, ¶ 34.

127. *FIFA*, 2005/C/976 & 986, ¶ 73; *see also* INT’L TENNIS FED’N, TENNIS ANTI-DOPING PROGRAMME: DECISION IN THE CASE OF COURTNEY NAGEL (2009), *available at* http://www.itftennis.com/shared/medialibrary/pdf/original/IO_40207_original.PDF [hereinafter Decision Regarding Nagel].

128. *FIFA*, 2005/C/976 & 986, ¶ 73.

129. *Id.* For example, places where passive smoking of marijuana exists.

130. In *P. v. International Tennis Federation*, CAS stated that:

In consideration of the fact that athletes are under a constant duty to personally manage and make certain that any medication being administered is permitted under the anti-doping rules, the prescription of a particular medicinal product by the athlete’s doctor does not excuse the athlete from investigating to their fullest extent that the medication does not contain prohibited substances.

CAS 2008/A/1488, ¶ 12.

131. *Id.*

132. *Id.* ¶ 15

133. *Despres / CCES*, CAS 2008/A/1489 & *WADA / Despres, CCES & Bobsled Can. Skeleton*, CAS 2008/A/1510, ¶ 7.6.

134. *Id.* ¶ 7.9(b).

135. *Id.* ¶ 7.9(a).

136. Decision Regarding Nagel, *supra* note 127, ¶ 3.1.1.3.

137. *Knauss / FIS*, CAS 2005/A/847, at 2.

supplement contained Norandrosterone.¹³⁸ The supplement's packaging did not indicate the presence of any prohibited substances;¹³⁹ however, he undertook further enquiries with the distributor.

CAS held that his conduct would have constituted "Significant Fault or Negligence"¹⁴⁰ if he had not made enquiries with the distributor. Overall, the athlete established "No Significant Fault or Negligence"¹⁴¹ because, notwithstanding enquiries with the distributor, he did not obtain independent expert advice or conduct his own investigations, which may have revealed the manufacturer being involved in lawsuits relating to certain products containing anabolic steroids.¹⁴² Further, CAS stated that a failure to test a supplement's composition, or refrain from taking the supplement altogether, "give[s] rise to ordinary fault or negligence at most, but . . . not . . . 'significant' fault or negligence . . ."¹⁴³ CAS upheld the eighteen-month suspension.¹⁴⁴

The reasoning and outcome of this award is unpersuasive for various reasons. Knauss was entitled to a slight reduction of suspension, notwithstanding the fact that he did not know that the supplement contained a prohibited substance, did not take the prohibited substance for performance-enhancing purposes, and took steps to ensure that no prohibited substance was ingested. CAS considered that he should have undertaken further enquiries and investigations. This reasoning ignores the commercial reality that manufacturers stand to lose a substantial proportion of clientele (i.e., any athletes bound by the WADC) if their products contain prohibited substances. Moreover, manufacturers face the prospect of costly lawsuits at the hands of athletes who ingest any products containing prohibited substances.¹⁴⁵ Athletes should therefore be able to rely reasonably on advice provided by manufacturers.

In *Despres v. Canadian Center for Ethics in Sport*, a Canadian bobsledder used a supplement to assist recovery from hip surgery unaware the supplement

138. *Id.* ¶ 17.

139. *Id.*

140. *Id.*

141. *Id.* ¶ 38.

142. *Id.* ¶ 35.

143. *Id.* ¶ 18.

144. *Id.* ¶¶ 28, 39.

145. In *Vencill v. USADA*, CAS upheld a two-year suspension of the U.S. swimmer resulting from ingesting a multivitamin contaminated with androstenediol, androstenedione, and norandrostenedione. CAS 2003/A/484, ¶ 4; Connolly, *supra* note 31, at 191. Following this, Vencill successfully sued the supplement manufacturer, Ultimate Nutrition, with a California jury awarding him \$578,635. Ben Fox, *Banned Swimmer Wins Case Over Supplements*, USA TODAY (May 13, 2005), http://www.usatoday.com/news/health/2005-05-13-swimmer_x.htm.

contained nandrolone.¹⁴⁶ The supplement was recommended by a sports nutritionist contracted by Bobsleigh Canada to give advice to athletes.¹⁴⁷ CAS stated that Despres' reliance on the nutritionist's advice did not amount to "No Significant Fault or Negligence"¹⁴⁸ because he could have done more, including contacting the supplement's manufacturer,¹⁴⁹ checking with his doctor whether the product was trustworthy,¹⁵⁰ or conducting further research.¹⁵¹ CAS further considered that Despres had taken the product for performance-enhancing purposes (to recover faster from surgery)¹⁵² and, therefore, did not reduce the two-year suspension.¹⁵³

To the extent that *Despres* stands for the proposition that athletes cannot reasonably rely on the advice of a sport nutritionist engaged by an NGB to provide athletes with advice on diet and nutrition, this lacks persuasive reasoning given a sports nutritionist's supposed expertise, which would include providing doping-related advice.

In *WADA v. Hardy & U.S. Anti-Doping Agency (USADA)*, a U.S. swimmer tested positive for Clenbuterol following the Beijing Olympic trials.¹⁵⁴ The American Arbitration Association (AAA) reduced the two-year suspension to one year.¹⁵⁵ WADA appealed to CAS.¹⁵⁶

CAS accepted that Clenbuterol was ingested because of contaminated supplements produced by AdvoCare.¹⁵⁷ Hardy had contacted various AdvoCare representatives, received advice that the supplements were independently tested and "formulated with quality ingredients,"¹⁵⁸ and obtained the supplement direct from AdvoCare.¹⁵⁹ She consulted her coach, team nutritionist, and a sports psychologist from the U.S. Olympic Committee

146. Despres / CCES, CAS 2008/A/1489 & WADA / Despres, CCES & Bobsled Can. Skeleton, CAS 2008/A/1510, ¶¶ 2.2, 2.7.

147. *Id.* ¶ 2.8.

148. *Id.* ¶ 7.14.

149. *Id.* ¶ 7.6.

150. *Id.* ¶ 7.9(a).

151. *Id.* ¶ 7.9(b).

152. *Id.* ¶ 7.20.

153. *Id.* ¶ 7.21.

154. WADA / Hardy & USADA, CAS 2009/A/1870, ¶¶ 5–6.

155. *Id.* ¶¶ 9, 14.

156. *Id.* ¶ 22.

157. *Id.* ¶ 114.

158. *Id.* ¶ 119 (quoting Advocare's website) (emphasis omitted); see also Blumenthal, *supra* note 45, at 216.

159. Hardy, CAS 2009/A/1870, ¶ 119.

about the quality of AdvoCare products.¹⁶⁰ Nothing on the supplement's label "raised suspicions."¹⁶¹ She had also taken the supplement for eight months¹⁶² and returned more than ten negative tests.¹⁶³ CAS held that she was negligent because she could have conducted further investigations or tested the supplement;¹⁶⁴ however, because she had shown "good faith efforts 'to leave no reasonable stone unturned,'"¹⁶⁵ it considered the one-year suspension appropriate.¹⁶⁶

Reporting on the AAA award upheld by CAS, Blumenthal commented that: "Hardy made tremendous efforts to ensure she was not taking a Prohibited Substance and still received a harsh penalty[, which ultimately] deprived her of the chance to compete in the [Olympic] Games."¹⁶⁷ Given the lengths Hardy had taken in good faith towards complying with her duty of "utmost caution," it seems unduly harsh to impose a one-year suspension; however, the WADC limits the potential reduction of any suspension to one year.

In *Squizzato v. Fédération Internationale de Natation Amateur*,¹⁶⁸ CAS made obiter remarks leaving open the possibility of a greater reduction; however, it is difficult to envisage an appropriate case. CAS considered that the mere adoption of the WADC "does not force the conclusion that there is no other possibility for greater or lesser reduction of a sanction than [one year]."¹⁶⁹ However, it held that unless a one-year suspension would be "serious[ly] and totally disproportionate,"¹⁷⁰ a "mere 'uncomfortable feeling'" cannot justify a further reduction below one year.¹⁷¹

Therefore, notwithstanding *Squizzato*, if an athlete establishes "No Significant Fault or Negligence," an imposed suspension will unlikely fall below one year.

160. *Id.*

161. *Id.*

162. *Id.*

163. Blumenthal, *supra* note 45, at 216–17.

164. *Hardy*, CAS 2009/A/1870, ¶ 120.

165. *Id.* (quoting *Despres / CCES*, CAS 2008/A/1489 & *WADA / Despres, CCES & Bobsled Can. Skeleton*, CAS 2008/A/1510, ¶ 7.8) (emphasis omitted).

166. *Id.* ¶ 129.

167. Blumenthal, *supra* note 45, at 217.

168. *S. / FINA*, CAS 2005/A/830.

169. *Id.* ¶ 48.

170. *Id.* ¶ 50.

171. *Id.*

C. Justifications for Prohibiting Doping

To evaluate the WADC's approach to doping, the justifications for prohibiting doping should be examined.

1. Performance Enhancement

Performance-enhancing substances are said to violate the principle of "fair play" in sport, because "clean" athletes relying on their natural potential are disadvantaged over "pharmacologically-enhanced rivals."¹⁷² In *Johnson v. Athletics Canada*, the court held that every athlete has a right to "fair competition, to know that the race involves only his own skill, his own strength, his own spirit and not his own pharmacologist."¹⁷³

Anabolic steroids¹⁷⁴ and hGH¹⁷⁵ can enhance performance in weightlifting and sprinting by allowing athletes to train longer and harder, recover faster, increase muscle size and strength, and decrease body fat.¹⁷⁶ EPO (popular in cycling)¹⁷⁷ increases red blood cell production, thereby enhancing endurance.¹⁷⁸ Cocaine and caffeine heighten alertness and reduce fatigue.¹⁷⁹ Codeine and morphine enable athletes to push through the pain barrier.¹⁸⁰ Beta-blockers reduce anxiety, which may assist with shooting or archery.¹⁸¹

However, this justification ignores the fact that performance-enhancing substances have been a part of sport for thousands of years.¹⁸² The ancient Greeks used ointments, rubs, and teas;¹⁸³ an ancient Greek physician named Galen prescribed "[t]he rear hooves of an Abyssinian ass, ground up, boiled in oil, and flavored with rose hips and rose petals."¹⁸⁴

172. Eoin Carolan, *The New WADA Code and the Search for a Policy Justification for Anti-Doping Rules*, 16 SETON HALL J. SPORTS & ENT. L. 1, 7 (2006); Foschi, *supra* note 32, at 457–58.

173. *Johnson v. Athletics Can.*, 1997 CarswellOnt 3340 (Can. Ont. Ct. J. Gen. Div.) (WL), ¶ 30.

174. Anabolic steroids are "drug(s) . . . or hormonal substance(s), chemically related to [the male growth hormone] testosterone." *Anabolic Steroids*, *supra* note 8.

175. Jurith & Beddoes, *supra* note 9, at 472.

176. Gandert & Ronisky, *supra* note 45, at 817; Opie, *supra* note 17, at 337.

177. Jurith & Beddoes, *supra* note 9, at 470.

178. *Id.*

179. Opie, *supra* note 17, at 336.

180. *Id.* at 337.

181. Jurith & Beddoes, *supra* note 9, at 472; Opie, *supra* note 17, 338.

182. Connolly, *supra* note 31, at 162.

183. Gandert & Ronisky, *supra* note 45, 816–17.

184. BILL MALLON & JEROEN HEIJMANS, HISTORICAL DICTIONARY OF THE OLYMPIC

Today, athletes combine diet and exercise with vitamins, supplements, medicine, specialised training techniques, and innovations in equipment. For example, a popular training technique is altitude training, which involves high-altitude training to produce hypoxia,¹⁸⁵ thereby enhancing sporting performances while at sea level.¹⁸⁶ Full-body swimsuits are worn to reduce water resistance.¹⁸⁷ Sprinters wear specialised spikes.¹⁸⁸ Tiger Woods even underwent laser-eye surgery to correct near-sightedness.¹⁸⁹

Drawing a line between acceptable and unacceptable forms of performance enhancement is a vexed question. As Hayden Opie opined, “[W]hat is the difference between an athlete who takes Vitamin B12 (not banned) and another who takes an anabolic steroid, when each does so with the intent of improving performance?”¹⁹⁰

Some commentators suggest that performance-enhancing substances and methods should be prohibited where they “‘disturb[] or obscure[] the hierarchies of “natural” talent that sports seek to exhibit’”:¹⁹¹

[Steroids] permit athletes . . . to train harder and recover faster . . . than they ever could without their use. And they effect psychological changes that contribute to their users’ aggressiveness and confidence (grit and determination) in training and in competition. These two effects together offer the potential for exponential improvements . . . that would not be naturally possible without drugs.¹⁹²

Further consideration of these issues falls outside the scope of this Article.

MOVEMENT 104 (4th ed. 2011).

185. Hypoxia is the term that describes the deprivation of oxygen to the body. François Billaut, *A Higher Calling, but Does Altitude Training Work*, AUSTRALASIAN SCI. (Sept. 2011), <http://www.australasianscience.com.au/article/issue-september-2011/higher-calling-does-altitude-training-work.html>.

186. *Id.* Interestingly, WADA considered whether “artificially induced hypoxic conditions” or hypoxia ought to be included on the Prohibited List; however, while determining that it does potentially enhance performance, WADA has declined to include it on the Prohibited List to date. *See generally* DORIANE LAMBELET COLEMAN ET AL., CTR. FOR SPORTS LAW & POL’Y, POSITION PAPER: WHETHER ARTIFICIALLY INDUCED HYPOXIC CONDITIONS VIOLATE “THE SPIRIT OF SPORT” (2006), available at <http://www.law.duke.edu/features/pdf/hypoxiaresponse.pdf>.

187. Travis Cranley, *Geared for Glory*, INSIDE SPORT, Aug. 2004, at 56, 59 (Austl.).

188. Hard, *supra* note 42, at 545–46.

189. *Woods Has Second Laser Eye Surgery*, GOLF.COM (May 15, 2007), <http://www.golf.com/ap-news/woods-has-second-laser-eye-surgery>; Hard, *supra* note 42, at 534–35.

190. Opie, *supra* note 17, at 335–36.

191. Doriane Lambelet Coleman & James E. Coleman, Jr., *The Problem of Doping*, 57 DUKE L.J. 1743, 1769 (2008) (quoting Richard A. Posner, *In Defense of Prometheus: Some Ethical, Economic, and Regulatory Issues of Sports Doping*, 57 DUKE L.J. 1725, 1731 (2008)).

192. *Id.* at 1769–70 (emphasis omitted).

For these purposes, the aforementioned discussion highlights that the use of performance-enhancing substances and methods is not inconsistent with sport, and intent to enhance performance is inherent in every athlete by virtue of their dedication to sport. The real concern is whether athletes use certain performance-enhancing substances to cheat or gain unnatural advantages over competitors or for fair and legitimate purposes.

2. Health Concerns

In the 1960 Rome Games, cyclist Knut Jensen died mid-race with amphetamines discovered in his body.¹⁹³ During the 1967 Tour de France, a British cyclist died with amphetamines and cognac in his system.¹⁹⁴ In 1987, heptathlete Birgit Dressel died of an acute allergy from “one of the many hundreds, possibly thousands, of drugs . . . voluntarily taken over the years.”¹⁹⁵

Various substances pose health risks to athletes. Anabolic steroids can cause heart disease, high cholesterol, liver damage,¹⁹⁶ females to lose their femininity,¹⁹⁷ and fetal malformation¹⁹⁸ and has links to depression, addiction,¹⁹⁹ and even murder²⁰⁰ and armed robberies.²⁰¹ Amphetamines can cause irregular heartbeat and high blood pressure.²⁰² Codeine or morphine may suppress serious injuries, thereby increasing the risk of aggravations.²⁰³

However, some substances may assist in treating medical conditions.

193. Hard, *supra* note 42, at 537.

194. *Id.*

195. *The Death of Birgit Dressel*, ATHLETICS, Feb.–Mar. 1988, at 6, 10 (Can.).

196. Jurith & Beddoes, *supra* note 9, at 471.

197. Opie, *supra* note 17, at 332.

198. Jurith & Beddoes, *supra* note 9, at 471.

199. Laura S. Stewart, Comment, *Has the United States Anti-Doping Agency Gone Too Far? Analyzing the Shift from “Beyond a Reasonable Doubt” to “Comfortable Satisfaction”*, 13 VILL. SPORTS & ENT L.J. 207, 239 (2006).

200. In June 2007, former World Wrestling Entertainment champion Chris Benoit murdered his wife and child before taking his own life. Toxicology reports indicated the presence of steroids and other drugs in his system, which have raised questions over whether the murder-suicide was a result of “roid-rage.” “*Roid-Rage*” *Questions Surround Benoit Murder-Suicide*, CNN U.S. (June 27, 2007), http://articles.cnn.com/2007-06-27/us/wrestler_1_roid-rage-athletes-use-steroids-nancy-and-daniel-benoit?s=PM:US; James Montgomery, *Chris Benoit Had Steroids, Other Drugs in His System at Time of Murder-Suicide*, MTV (July 17, 2007), <http://www.mtv.com/news/articles/1564953/chris-benoit-had-steroids-his-system.jhtml>. See also Opie, *supra* note 17, at 333.

201. Opie, *supra* note 17, at 333.

202. Jurith & Beddoes, *supra* note 9, at 472.

203. Opie, *supra* note 17, at 337.

Steroids can assist recovery from muscle injuries.²⁰⁴ The use of hGH helped NFL running back Abdul-Karim al-Jabbar regain function in his injured knee.²⁰⁵ Canadian bobsledder Serge Despres took a recommended supplement, which contained nandrolone, to assist recovery from hip surgery.²⁰⁶ Moreover, the “health protection” justification ignores the fact that many sports encourage athletes to put their bodies at risk,²⁰⁷ are inherently dangerous,²⁰⁸ and allow athletes to compete while injured.²⁰⁹

Through its Therapeutic Use Exemptions (TUEs), the WADC recognises the benefits of some prohibited substances. This raises the question why the WADC allows athletes with TUEs to use prohibited substances, but without a TUE, an athlete faces unenviable prospects under Articles 10.4 and 10.5. The author suggests that the former is consistent with honest intentions, whereas the latter is suggestive of dishonesty.

On balance, without doping control, more tragedies will surely occur that could tarnish public perception of a sport. There exist strong reasons favouring prohibition; however, there should be increased flexibility to reflect the fact that athletes sometimes take prohibited substances for genuine reasons, albeit in a careless manner.

3. The “Spirit of Sport”

The WADC stipulates that doping is “fundamentally contrary” to the

204. Blumenthal, *supra* note 45, at 219–20.

205. Tom Farrey, *HGH: Performance Enhancer or Healer?*, ESPN, <http://sports.espn.go.com/espn/news/story?id=2574291> (last updated Sept. 7, 2006); Blumenthal, *supra* note 45, at 219–20.

206. Despres / CCES, CAS 2008/A/1489 & WADA / Despres, CCES & Bobsled Can. Skeleton, CAS 2008/A/1510, ¶ 7.20.

207. In *Agar v. Hyde*, Chief Justice Gleeson stated that “[a]ccepting risk, sometimes to a high degree, is part of many sports. . . . Sporting activities of a kind that sometimes result in physical injury are not only permitted; they are encouraged.” 201 CLR 552, at 15 (High Ct. Austl. 2000).

208. Dr. Thomas Murray noted that “Alpine ski racers careen down steep slopes at 100 kilometers an hour, and road cyclists descend long hills at comparable speeds. They are likely to find the tender concern that they might hurt themselves if they take steroids or EPO a tad hypocritical.” Thomas H. Murray, *In Search of The Spirit of Sport*, PLAY TRUE, no. 3, 2007 at 24, 25, available at http://www.wada-ama.org/Documents/Resources/Publications/PlayTrue_Magazine/PlayTrue_2007_3_Record_Pace_EN.pdf.

209. Following the 2003 Australian Football League (AFL) Grand Final, it was revealed that up to eighteen vials of pain killing drugs were used by the Brisbane Lions football club to ease the pain of players during its premiership victory, including that of midfielder Nigel Lappin, who played with a punctured lung and risked “serious, even life-threatening lung collapse.” Karen Lyon, *Warning to AFL on Pain Killers*, REALFOOTY (Sept. 30, 2003), <http://www.theage.com.au/articles/2003/09/29/1064819870801.html>.

“spirit of sport.”²¹⁰ It is considered that prohibiting doping is justified to protect the integrity of Olympic competition, the political and social value placed on Olympic competition, the philosophy of Olympism,²¹¹ and the interests of stakeholders.²¹²

Doping threatens to undermine the credibility of sporting icons and the legitimacy of their accomplishments,²¹³ and even the suggestion of doping threatens a sport or athlete’s integrity.²¹⁴

Following Usain Bolt’s performances at the 2008 Beijing Olympics, where he won three gold medals with world record times, the legitimacy of his achievements was brought into question (notwithstanding his history of never testing positive).²¹⁵

Cycling is a sport tainted by a long history of actual and rumoured performance-enhancing drug use.²¹⁶ In February 2012, CAS found three-time Tour de France winner Alberto Contador guilty of a doping offence resulting from a positive test of Clenbuterol during the 2010 Tour.²¹⁷ Contador’s

210. WADA CODE: FUNDAMENTAL RATIONALE FOR THE WORLD ANTI-DOPING CODE 14 (2009). The WADC defines the “spirit of sport” in broad terms as the

[C]elebration of the human spirit, body and mind . . . characterized by the . . . values [of] ethics, fair play and honesty[,], health[,], excellence in performance[,], character and education[,], fun and joy[,], teamwork[,], dedication and commitment[,], respect for rules and laws[,], respect for self and other Participants[,], courage[,], and community and solidarity.

Id. (emphasis omitted).

211. Hard, *supra* note 42, at 533.

212. In *Johnson v. Athletics Canada*, the court noted the interests of various stakeholders, stating that:

The public has an interest in the protection of the integrity of the sport. Governments around the world subsidize their elite athletes through carding systems. The public pays to attend the events. The elite athlete is viewed as a hero and his influence over the young athlete cannot be underestimated. Mr. Johnson became both rich and famous during his athlete career as a result of his athletic performances.

1997 CarswellOnt 3340 (Can. Ont. Ct. J. Gen. Div.) (WL), ¶ 31.

213. Jurith & Beddoes, *supra* note 9, at 462.

214. Robyn R. Goldstein, Note, *An American in Paris: The Legal Framework of International Sport and the Implications of the World Anti-Doping Code on Accused Athletes*, 7 VA. SPORTS & ENT L.J. 149, 151 (2007).

215. Meredith Lambert, *The Competing Justices of Clean Sport: Strengthening the Integrity of International Athletics While Affording a Fair Process for the Individual Athlete Under the World Anti-Doping Program*, 23 TEMP. INT’L & COMP. L.J. 409, 409–10 (2009).

216. See Nicholas Hailey, Note, *A False Start in the Race Against Doping in Sport: Concerns with Cycling’s Biological Passport*, 61 DUKE L.J. 393, 393 (2011) (considering that “professional cycling has suffered from a number of doping scandals”).

217. UCI / Contador & Royal Spanish Cycling Federation (RFEC), CAS 2011/A/2384 & WADA / Contador & RFEC, CAS 2011/A/2386, ¶¶ 8–11, 512; Ian Austen, *Another Tour de France Winner is Penalized for Doping*, N.Y. TIMES, Feb. 10, 2012, at B12.

winning result was disqualified, and a two-year suspension was imposed.²¹⁸ In February 2012, CAS found retired Olympic gold medalist and 1997 Tour winner Jan Ullrich guilty of doping²¹⁹ and imposed a “symbolic” two-year suspension.²²⁰ In June 2012, USADA brought doping charges against seven-time Tour winner Lance Armstrong for tests “fully consistent with blood manipulation, including EPO use and/or blood transfusions.”²²¹

On October 10, 2012, USADA handed down a “Reasoned Decision” that purports to prove “beyond any doubt that the US Postal Service Pro Cycling Team ran the most sophisticated, professionalized and successful doping program that sport has ever seen.”²²² The lengthy decision (over 1000 pages long) paid regard to sworn witness testimony from twenty-six people (including fifteen riders and former teammates of Armstrong) that Armstrong (among other things) used, possessed, and trafficked in performance-enhancing substances, including EPO.²²³ In a statement released by USADA, it stated that: “Hopefully, the sport can unshackle itself from the past, and once and for all continue to move forward to a better future. Our mission is to protect “clean” athletes by preserving the integrity of competition not only for today’s athletes but also the athletes of tomorrow.”²²⁴

While defining the “spirit of sport” is difficult, and further examination of this issue falls outside the scope of this Article, there is little doubt that doping leaves “a sour taste in peoples’ mouths,” which threatens to undermine and damage the integrity of sport. More importantly, serious question marks surround whether such stigma attaches to inadvertent or innocent dopers with no malicious intent to cheat.

218. *Contador*, CAS 2011/A/2384 & 2386, ¶¶ 7, 512.

219. *See* UCI / Ullrich & Swiss Olympic, CAS 2010/A/2083, ¶ 67.

220. *Id.* ¶ 78; Austen, *supra* note 217.

221. Juliet Macur, *Armstrong Faces New Doping Charges*, N.Y. TIMES, June 14, 2012, at B13 (quoting USADA); Juliet Macur, *Armstrong May Owe \$5 Million to Company if Guilty of Doping*, N.Y. TIMES, June 23, 2012, at D6. Since the time of writing this paper, Lance Armstrong has declared that he will not be defending charges brought by USADA, although controversy remains over whether USADA has the power to strip Armstrong of his seven Tour de France victories. *See* Peter Kogoy, *USADA Has “No Legal Right” to Strip Lance Armstrong*, THE AUSTRALIAN (Aug. 27, 2012), <http://www.theaustralian.com.au/sport/cycling/usada-has-no-legal-right-to-strip-lance-armstrong/story-fn8sc2wz-1226458458001>.

222. Statement from USADA CEO Travis T. Tygart Regarding The U.S. Postal Service Pro Cycling Team Doping Conspiracy, USADA (Oct. 10, 2012), <http://cyclinginvestigation.usada.org/>.

223. *Id.*

224. *Id.*

V. CRITIQUE

“[T]o catch the majority of the “guilty” parties while sacrificing a few “innocent” ones [is] a concept incompatible with the basic tenets of civilized societies.”²²⁵

As discussed herein, the imposition of an automatic disqualification and two-year suspension is justified where doping is proved to protect “clean” athletes and promote “clean” sport.²²⁶

Some commentators consider that where an athlete can establish that he or she did not intend to enhance performance and there was no actual performance-enhancing effect, his or her competition results could be allowed to stand.²²⁷ This approach, however, disregards the impact on sport where there is a mere suggestion of doping.²²⁸

With regard to suspensions, the *Hardy*, *Melnychenko*, *Knauss*, and *Despres* awards highlight the insufficient distinction made between “intentional” doping, and conversely “innocent” and “inadvertent” doping.

The purpose of imposing suspensions is to punish, deter, and prevent cheating.²²⁹ In *BOA v. WADA*,²³⁰ WADA submitted that BOA’s Bye-Law²³¹ “has all the aims of a doping sanction . . . : (i) punishment for *cheating*; (ii) protection against/prevention of further *cheating* by the same athlete; (iii) deterrence from *cheating* by other athletes; and (iv) maintaining public confidence in the integrity of sport.”²³²

In their opinion on the WADC’s conformity with international law, Kaufmann-Kohler, Rigozzi, and Malinverni cited with apparent approval the following comments: “[I]f the rewards for a cheater even when caught are greater than for the [sic] obeying the rules, cheating will continue. . . . An effective penalty should ensure that there are greater disadvantages than advantages in cheating.”²³³

225. Kaufmann-Kohler et al., *supra* note 20, ¶ 91 (quoting Aaron N. Wise, “Strict Liability” *Drug Rules of Sports Governing Bodies*, 146 NEW L.J. 1161 (1996) (U.K.)).

226. Baxter / IOC, CAS 2002/A/376, ¶ 32.

227. Anne Amos, *Inadvertent Doping and the WADA Code*, 19 BOND L. REV. 1, 23 (2007) (Austl.).

228. Goldstein, *supra* note 214, at 151. See *infra* notes 213–14.

229. See Kaufmann-Kohler et al., *supra* note 20, ¶ 102.

230. BOA / WADA, CAS 2011/A/2658.

231. The BOA Bye-Law in question deemed all athletes who had been found guilty of doping offences ineligible for any Olympic team.

232. BOA, CAS 2011/A/2658, ¶ 5.53 (emphasis added).

233. Kaufmann-Kohler et al., *supra* note 20, ¶ 155 (quoting *Johnson v. Athletics Can.*, 1997 CarswellOnt 3340 (Can. Ont. Ct. J. Gen. Div.) (WL), ¶ 32).

The above passages indicate that the elimination of “cheating” is the WADC’s primary objective. It follows that if an athlete has not cheated, no suspension should be imposed.

While developing a universal definition of “cheating” is difficult due to its subjective nature,²³⁴ it is clear that “cheating” examines an athlete’s mindset and the reasons why doping occurred. Intentional dopers take performance-enhancing substances to attain unnatural, exponential advantages over rivals, while “[a]rguably, an athlete who tests positive through inadvertent or innocent doping does not contravene the spirit of fair play.”²³⁵

While inadvertent or innocent dopers may have been careless or failed to exercise the “utmost caution,” their behaviour falls well short of athletes who intentionally take performance-enhancing substances to gain unnatural competitive advantages.

Doubts surround whether suspensions provide any greater punishment or deterrent than the threat of disqualifications. Athletes dedicate substantial time and effort towards competing and succeeding at the Olympic Games; therefore, there is substantial weight to the argument that the threat of disqualifications, relinquishing medals, having one’s Olympic dreams destroyed, and being branded a cheat pose greater deterrents than any suspension ever could.²³⁶

In order to comply with the principle *nulla poena sine culpa*,²³⁷ Article 10.5.1 should remain in the WADC to allow athletes bearing “No Fault or Negligence” the opportunity to avoid suspension.²³⁸

However, with the objective of eliminating cheating in mind,²³⁹ Articles 10.4 and 10.5.2 should be replaced with a new Article:

Where an *Athlete* or other *Person* can establish:

- (a) To the comfortable satisfaction of the hearing panel, that the use of a *Prohibited Substance* was not intended to enhance the

234. Coleman & Coleman, Jr., *supra* note 191, at 1753 (stating that “like obscenity, child maltreatment, and torture—[drug cheating] is at least in some respects in the eye of the beholder”).

235. Opie, *supra* note 17, at 346.

236. See Maureen A. Weston, *Doping Control, Mandatory Arbitration, and Process Dangers for Accused Athletes in International Sports*, 10 PEPP. DISP. RESOL. L.J. 5, 7 (2009) (noting that the mere accusation of doping “converts the admired athlete into an apparent pariah” and that years of “training, competing, and working with coaches and teammates hardly prepares him or her for the complex process involved in clearing his or her name”).

237. The principle *nulla poena sine culpa*, prominent in criminal law and doping law, provides that a person may only be punished for an offence if he or she knowingly or negligently committed such offence. Kaufmann-Kohler et al., *supra* note 20, ¶ 118.

238. *Id.* at ¶¶ 126–28.

239. UNESCO International Convention, *supra* note 6.

Athlete's sporting performance, or mask the *Use* of another *Prohibited Substance*; and

- (b) To the comfortable satisfaction of the hearing panel, that the presence of the *Prohibited Substance* in the *Athlete's* body will not actually or potentially enhance the *Athlete's* sporting performance in future competitions;

the period of *Ineligibility* found in Article 10.2 shall be replaced with the following:

First violation: A reprimand and no period of *Ineligibility*.

If the *Athlete* satisfies paragraph (a) only, then the period of *Ineligibility* shall be replaced with the following:

First violation: The lesser of:

- (a) A period of *Ineligibility* commensurate with a period the hearing panel considers the prohibited substance will likely enhance the *Athlete's* sporting performance in future competitions; or
- (b) Two (2) years of *Ineligibility*.

To justify any elimination of sanction or imposition of any ineligibility period less than two (2) years, the *Athlete* or other *Person* must produce corroborating medical evidence in addition to his or her word, which establishes the above elements to the comfortable satisfaction of the hearing panel.

If the *Prohibited Substance* is not a "specified substance," the "comfortable satisfaction" standard requires a very high standard almost approaching beyond reasonable doubt.

In determining whether the use of a *Prohibited Substance* was not intended to enhance the *Athlete's* sporting performance, or mask the *Use* of another *Prohibited Substance*, the anti-doping organisation can have regard to the steps taken by the athlete in complying with his or her duty of "utmost caution."

The above-proposed Article is justified for the following reasons:

1. The Article maintains strict liability, while affording athletes the opportunity to prove their innocence.
2. By eliminating the requirement of knowledge of how a prohibited substance entered his or her body, inadvertent dopers may avoid suspension if they can establish no intent to use prohibited substances for performance-enhancing purposes.
3. The Article applies to all prohibited substances,²⁴⁰ reflecting the

240. As opposed to Article 10.4, which applies solely to "Specified Substances." WADA CODE art. 10.4 (2009).

notion that products, which contain prohibited substances, may be used for legitimate purposes.

4. Athletes who ingest prohibited, non-specified substances must establish, to a higher standard of proof, the absence of a performance-enhancing purpose and no future performance-enhancing effect, reflecting the notion that prohibited substances are less likely to have a credible, non-doping explanation²⁴¹ and are more likely to have future performance-enhancing effects.
5. In determining whether use of a prohibited substance was for a performance-enhancing purpose, the Article presumes that intentional dopers will face significant hurdles in demonstrating compliance with the duty of “utmost caution,” because this would require the collaboration of others, including treating doctors, sports physicians, and the product’s manufacturer. Conversely, inadvertent or innocent dopers should more readily establish no performance-enhancing purpose, because although an athlete would have been careless or less than diligent in some manner, he or she would presumably have taken some steps to ensure that no prohibited substance entered his or her body.
6. This Article provides that an athlete must establish that the prohibited substance was not taken for a performance-enhancing purpose (as opposed to the product). In *Despres*, CAS accepted that the athlete took a supplement for a performance-enhancing purpose (i.e., to recover faster from surgery), notwithstanding lack of knowledge that it contained a prohibited substance.²⁴² Applying this approach, the two-year ineligibility period would have been eliminated if Despres could have established that the prohibited substance was not taken for a performance-enhancing purpose and that it was not likely to have a future performance-enhancing effect.
7. The Article omits any reference to a “reduction” of sanction, allowing for elimination or an imposed sanction less than two years. This reflects the rationale that any ineligibility period would be disproportionate and violate the principle of *nulla poena sine culpa* if an athlete inadvertently or innocently dopes, with any period of ineligibility imposed reflecting the period of likely future performance-enhancing impact.

241. See, e.g., *id.* art. 10.4 cmt.

242. Despres / CCES, CAS 2008/A/1489 & WADA / Despres, CCES & Bobsled Can. Skeleton, CAS 2008/A/1510, ¶ 7.20.

8. If the athlete can establish no future performance-enhancing effect, there will be no injustice in allowing the athlete to compete in future events. If there will be some future performance-enhancing effect, the suspension should reflect such unfairness to “clean” athletes.

Other amendments falling outside of the scope of detailed consideration include amending the criteria for inclusion onto the Prohibited List,²⁴³ reviewing the List to reflect sport-specific concerns,²⁴⁴ and amending the proposed re-inserted “Osaka Rule”²⁴⁵ to apply only to intentional dopers.

VI. CONCLUSION

Athletes who are intent on cheating will do so by taking steps to ensure their use of performance-enhancing substances goes undetected. Big pharmaceuticals are continuously creating new drugs that may be misused by cheating athletes,²⁴⁶ while “designer steroids” are created specifically to avoid detection.²⁴⁷ In these respects, anti-doping authorities are always one step behind. Moreover, there is a growing awareness of the health risks posed by many prohibited substances requiring combative action by sporting bodies. There are strong reasons supporting strict liability.

However, in adopting such a strict approach, the WADC has lost focus on its primary goal: to eliminate cheating in sport. Like match fixing, doping strikes at the heart of sport.²⁴⁸ The “use of banned substances damages the

243. To be included on the Prohibited List, a substance or method must satisfy at least two of the following: 1. It must actually or potentially enhance sporting performance; 2. It must present an actual or potential health risk to athletes; and 3. In WADA’s opinion, it must violate the “spirit of sport.” WADA CODE art. 4.3.1. The 2015 first draft proposes an amendment such that a substance or method must satisfy criteria 1, and either 2 or 3. WADA CODE: DRAFT VERSION 1.0 art. 4.3, available at http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-The-Code/Code_Review/Code%20Review%202015/Code-Draft-1.0/WADA-Code-2015-Draft-1.0-redline-d-to-%202009-Code-EN.pdf [hereinafter WADA CODE DRAFT]. This amendment should be approved for the reasons outlined herein.

244. For example, anabolic steroids may enhance performance in sports requiring increased strength and power, such as weightlifting, sprinting, field events, and some swimming events. However, it is difficult to see how the use of anabolic steroids could enhance sporting performance in games that do not require elevated levels of physical strength, such as shooting, archery, or golf. See Opie, *supra* note 17, at 337–39.

245. WADA CODE DRAFT art. 10.15. As highlighted above with regard to the BOA Bye-Law, WADA submitted that it has the same purposes of suspension sanctions, being punishment, deterrence, and preventing cheating.

246. Connolly, *supra* note 31, at 169.

247. *Id.* at 172–74.

248. See generally Richard H. McLaren, *Is Sport Losing Its Integrity?*, 21 MARQ. SPORTS L. REV. 551 (2011).

health of users, cheats, honest athletes, and makes fools of spectators.”²⁴⁹

The WADC should be amended such that its focus is reformulated from whether the athlete complied with his or her duty of “utmost caution,” to whether the athlete intended to use a prohibited substance for a performance-enhancing purpose; and if so, whether there will be a future performance-enhancing effect. This amendment more appropriately balances the protection of “clean” sport by punishing and deterring intentional doping, while enabling innocent and inadvertent dopers to avoid suspension for careless (rather than malicious) actions.

249. *Spoiled Sport*, INSIDE SPORT, Oct. 1997, at 28, 30 (Austl.).